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IN THE

Supreme Court of the United States

OCTOBER TERM—1941.

No. 1229

KLAXON COMPANY,

Petitioner,

v.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE COURT PRESS, N. Y. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, above named, submits its petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above cause February 9, 1942.

Opinions Below.

The opinion of the District Court is reported at 30 Fed. Supp. 425.

The original opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 268.

The opinion of this Court upon the prior petition for certiorari is reported at 313 U. S. 487.

The opinion of the Circuit Court of Appeals upon remand from this Court is reported at 125 F. (2d) 820.

All italics herein are by counsel, unless otherwise indicated.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936).

Statutes Involved.

The pertinent statutes are set forth in the Appendix.

Statement.

On June 1, 1929, Stentor Electric Manufacturing Company, Inc., a New York corporation, instituted an action in the United States District Court for the District of Delaware against Klaxon Company, a Delaware corporation with offices at Newark, New Jersey. Damages were claimed for breach of covenant by Klaxon to use its best efforts to further the manufacture and sale of certain patented devices covered by an agreement dated May 20, 1918 and executed in the State of New York (Apt. Appx. 15-22). The jury, on July 18, 1939, returned a verdict in Stentor's favor for $100,000, and judgment was entered thereon July 20, 1939 (Apt. Appx. 2). Six days thereafter, viz., on July 26, 1939, plaintiff moved to correct the judgment by adding interest at the rate of 6% from June 1, 1929, the date of institution of suit (Apt. Appx. 44).

This was the first time that the question of interest was raised. The contract contained no provision for interest and no request for an instruction to the jury regarding interest had been made at the trial. The District Court charged the jury on the subject of damages as follows:

"If you find from the evidence and under the

> principles of law given to you by the court that the defendant broke its contract, your verdict should be for the plaintiff in such amount as will compensate it for the damages flowing from such breach" (Apt. Appx. 267).

No issue as to the place of performance of defendant's covenant had been considered by counsel, court or jury. Inasmuch as the verdict was for only a fraction of the *ad damnum* ($1,000,000) it was impossible to determine whether or not the jury included interest in the verdict as rendered.

The stated basis for the motion for interest was Section 480 of the New York Civil Practice Act, which provides:

> "Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a,* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

The District Court on December 14, 1939, granted the motion, adding $60,821.92 to the judgment as orig-

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* Relating to actions on policies of life insurance. The provision is set out in the Appendix, *infra*.

inally entered (Apt. Appx. 68). The Circuit Court of Appeals, while conceding the difficulty of the interest question, concluded that Section 480 of the New York Civil Practice Act governed because (1) the matter of recovery of interest and the rate thereof was a matter of substance; (2) therefore it was governed by the law of the place of performance of the contract; and (3) New York was the place of performance.

This Court allowed certiorari on the question whether Section 480 of the New York Civil Practice Act was applicable. 312 U. S. 674. The decision of this Court remanded the case to the Circuit Court of Appeals for a determination of the applicable Delaware law. The Circuit Court again affirmed the District Court's award of interest on the ground that a Delaware state court would come to the same conclusion reached by the Circuit Court in its former decision. 125 F. (2d) 820, 824.

Questions Presented.

(1) Under the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, may a Federal Court, in a diversity of citizenship case, upon finding there is no conclusive state authority, decide the question involved by mere speculation and conjecture as to how the state court would or should decide it?

(2) Under the rule of *Erie* v. *Tompkins, supra,* may a Federal Court, in a diversity case, decline to follow the considered dicta of the state court when no stronger authority is available, and, if so, what should be the guiding rule or principle?

(3) When the statute of a foreign state is applicable under the rule of *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, may the Federal Court decline to apply a decision of the foreign state construing the statute?

Specific Assignments of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In sustaining the District Judge's addition of $60,821.92 interest to the verdict.

(2) In its application of the decisions of this Court in *Erie* v. *Tompkins, supra; Klaxon Co.* v. *Stentor Electric Mfg. Co., supra,* and *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223.

(3) In determining the applicable Delaware law.

(4) In determining the applicable New York law.

Reasons For Granting the Writ.

I.

The decision below is in conflict with decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits on a question constantly recurring in diversity cases.

The present state of confusion in regard to the scope of *Erie* v. *Tompkins* is illustrated by the fact that an outstanding scholar has expressed the view that *this Court's own decisions* developing this phase of *Erie* v. *Tompkins* are in conflict one with another. In an article entitled "The Federal Courts and the Conflict of Laws", 36 Ill. L. Rev. 493, Walter Wheeler Cook, referring to the paragraph in *West* v. *American Tel. & Tel. Co., supra,* beginning: "A state is not without law save as its highest court has declared it.", wrote:

> " 'All the available data' are to be used. What are these 'data'? Are they not all the 'data'

> which a state court itself would be free to use? If so, would a state court, even of first instance, have to follow the earlier decision of a single judge? Obviously not; yet that is what in the *Fidelity Trust* case Mr. Chief Justice Hughes and his colleagues compelled a federal court to do. It is believed that if federal judges are to be compelled to follow so inadequate a technique, *the extension of the doctrine of the Tompkins case to cases in the conflict of laws will have done great harm.* * * * "

Petitioner respectfully submits that the present petition furnishes an opportunity to dispel the existing confusion with respect to the scope of the Erie doctrine, to resolve the conflict between various Circuit Courts of Appeals and to improve thereby the administration of justice in the lower federal courts.

(a)

The Court below was convinced that there was no direct Delaware authority for the application of the law of a foreign state in regard to interest. At the outset of its opinion it said (125 F. (2d) 820, 822):

> "Although neither of the parties to this litigation could be expected to admit it categorically, it is clear after an extended search that there is no square Delaware authority which holds that in a suit in Delaware on a contract made and performable elsewhere, the Delaware court will refer to the law of the place of performance to determine whether interest as damages is recoverable and, if so, at what rate."

Again the Court said (pp. 823, 824):

> "What is a federal court to do, then, when the question before it is a matter of state law and

there is found no conclusive authority in the state decisions upon the point? Both of the parties urge upon the court the ascertainment of the state law 'from all the available data'. We accept that admonition completely and follow it."

In the case of *Nelson* v. *Canadian Industrial Alcohol Co.*, 188 Atl. 39, 8 W. W. Harr. 26; id. 189 Atl. 591, 8 W. W. Harr. 165, aff'd 197 Atl. 477, 9 W. W. Harr. 184, the Court purported to find the decisive datum in support of its former decision.

The *Nelson* case was an action of assumpsit on the common counts for the recovery of a commission for procuring a purchaser for a stock of whisky. There was a jury trial and a verdict rendered for $100,000 on April 13, 1935. The defendant immediately made a motion in arrest of judgment and for a new trial. The trial court denied these motions on September 13, 1935 and entered judgment in plaintiffs' favor as follows:

> "And Now To Wit, this Thirteenth day of September, A. D. 1935, judgment on verdict in favor of the plaintiffs for the sum of One Hundred Thousand Dollars, besides costs, etc."

Appeal was taken to the Supreme Court of Delaware and the judgment was affirmed. The defendant had urged at the trial that the value of plaintiffs' services *in Canada* was the measure of recovery. The trial court refused so to charge. This ruling was sustained on the appeal, the Supreme Court being of the opinion that New York rather than Canada was the place of making and the place of performance of the agency contract and that the value of plaintiffs' services in New York was the measure of recovery. 188 Atl. 39, 54.

On December 3, 1936 defendant paid to plaintiffs' attorneys the sum of $100,000 and paid to the prothonotary the amount of the costs. Shortly thereafter defendant paid to the plaintiffs' attorneys the sum of $7,327.59 as interest on the $100,000 from September 13, 1935, the date of entry of the judgment, to December 3, 1936, when the $100,000 was paid. The plaintiffs refused to execute satisfaction of the judgment upon the ground that they were entitled to interest from April 13, 1935, the date of the verdict, to September 13, 1935, the date of entry of the judgment. The defendant therefore brought a petition in the Superior Court to have the judgment marked satisfied.

On the petition two points were argued by the defendant: (1) that interest from date of verdict to date of judgment was not recoverable in Delaware; and (2) that in any event the form of the particular judgment under consideration, *i. e.*, the fact that it made no reference to interest from the date of verdict, precluded the recovery of such interest. Both parties filed exhaustive briefs. On both sides it was brought out that there was, and had been since 1844, a New York statute providing for the allowance of interest from date of verdict to date of judgment (now Sec. 480 of the Civil Practice Act). Indeed, the provision was quoted in one of the briefs and was referred to at least six times. The opinion in the case was written by Harrington, *J.*, who had sat as a member of the Supreme Court which had decided that the contract was made and was to be performed in New York. In his opinion Judge Harrington recited the Delaware statutes urged as having some bearing on the question of the allowance of interest on verdicts and referred to the common law

authorities cited in the briefs, including two early New York cases. However, notwithstanding that the New York provision squarely covering the question was before him and was repeatedly referred to, he ignored the statute. Apparently to Delaware court and counsel the New York moratory interest statute was not controlling.

The Court finally granted the petition on the second ground above set forth (189 Atl. 591), and its determination was affirmed in 197 Atl. 477.

If, as previously urged by the plaintiff in the instant case before this Court and before the Circuit Court of Appeals on the remand, the holding in the *Nelson* case that the measure of recovery is that of the place of performance entails that moratory interest must also be allowed according to the law of the place of performance, then the plaintiffs in the *Nelson* case were entitled to interest *prior* to the verdict, as well as from verdict to judgment. The second sentence of Section 480 of the New York Civil Practice Act had been in force since 1927. The services which were the subject of the suit were rendered between August, 1933 and November, 1933, and the writ was served June 8, 1934. Interest prior to verdict, if recoverable, would therefore have been a considerable sum. If plaintiff were right about the extra-territorial application of Section 480 of the Civil Practice Act and about the Delaware rule of conflict of laws as to interest, the *Nelson* case was a perfectly clear case for the allowance of interest from date of writ to date of verdict as well as from date of verdict to date of judgment.

Petitioner therefore urged the *Nelson* case in the Court below as evidence of a practice on the part of the Delaware courts and bar of looking to Delaware's own rule regarding moratory interest to the

exclusion of the *lex loci*. But the Court below dismissed petitioner's argument from the *Nelson* case on the ground, *inter alia*:

> "In the main litigation there is nothing to indicate that anybody ever thought of the New York statute."*

The Court stated as follows the basis upon which it found the *Nelson* case to be a decisive authority for *plaintiff's* position:

> "Among the items of data available is the approach of the Delaware Supreme Court to this kind of problem in the *Nelson* case. The court accepted the legal theory of the measure of damages as a matter of substance and that reference will be made to the appropriate foreign law. That law the court held was the law of the place of performance. It did not have previously decided Delaware cases to settle the point. It examined and cited cases from other states, three

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* Petitioner cited another case where the Delaware Court ignored the interest provision of the *locus*, viz., *Jacobs* v. *Murray*, 113 Atl. 803, 1 W. W. Harr. 809. This was an action of assumpsit on a promissory note made in New York and payable in New York. The court nevertheless based its allowance of interest entirely upon the Delaware authorities. The Court below disposed similarly of the *Jacobs* case, viz.:

> "There is no indication in the report, however, that either court or counsel had considered the possibility of the application of any other than the Delaware rule to the facts."

In view of this Court's approving reference in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 236 to "rules of decision commonly accepted and acted upon *by the bar* and inferior courts", the very fact that in both the *Nelson* case and the *Jacobs* case it never even occurred to the courts or outstanding Delaware counsel to apply the interest rules of New York, the *locus*, seemed to constitute these cases good authority for petitioner's position in the Court below.

current textbooks in the Conflict of Laws and the Restatement. It accepted and applied what was set forth in these sources. This seems to us strong evidence of what the Delaware court would do in a conflict of laws problem, and the case gains additional strength from the fact that it was recently decided."

Thus, the only point that the Court below was able to extract from the *Nelson* case was that on a *different* point of law, *viz.*, that the obligation to pay damages is governed by the law of the place of performance, the Delaware Court accepted the rule laid down by the Restatement of Conflict of Laws and current textbooks, etc.* Petitioner does not understand how this fact gives rise to even the weakest sort of inference as to how the Delaware courts would decide the question presented in the case at bar. It may well be that in numerous cases involving conflict of laws the Delaware courts have differed with the textbooks, hornbooks and Restatement of Conflict of Laws without citing them. It is indeed a novel doctrine that a court is presumed to

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* Actually, it was not held in the *Nelson* case that the measure of damages was governed by the *law* of New York, but only that the trial court committed no error in refusing to charge that the value of plaintiffs' services should be computed according to *standards of compensation* prevailing in Montreal (Record, p. 348). Compare footnote 3 of the opinion below. The Trial Court in the *Nelson* case did *not* charge that New York law or New York standards of compensation determined the measure of damages (Record, p. 355).

Later in its opinion the Court below referred to "the Court's full reference to the foreign law in *Nelson* v. *Canadian Industrial Alcohol Co.*, 38 Del. 165, 189 A. 591 (1937)". That opinion contains numerous references to English, New York, Pennsylvania and New Jersey decisions tracing the history of the allowance of interest. But there is no "reference to the foreign law" in the conflict of laws sense.

have endorsed the entire contents of a treatise by citing it once or even repeatedly.*

The only other item of "available data" relied on by the Court below was stated as follows:

> "We think it not without significance, also, that the Restatement of the Law has been cited in sixty-eight instances in reported Delaware decisions and that fourteen of these citations are to the Conflict of Laws."

Of what significance are these statistics? It does not even appear whether the Delaware courts on these occasions followed the Restatement or distinguished it or cited it as "contra". Moreover, there may have been far more numerous occasions when the Delaware courts tacitly disagreed with the Restatement. A leading article in the current issue of the Yale Law Journal is devoted to showing that the very portion of the Conflict of Laws Restatement which the Circuit Court of Appeals has applied in this case is constantly at loggerheads with judicial views on the subject. See Nussbaum, *Conflict Theories*

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* Similarly, at page 822, the Court conjectured:

> "The plaintiff cites cases like *Maberry and Pollard* v. *Shisler*, 1 Har. 349 (Del. 1833); *Mackenzie Oil Co.* v. *Omar Oil & Gas Co.*, 34 Del. 435, 458-9, 154 A. 883 (1929); and *Phoenix Oil Co.* v. *Mackenzie Oil Co.*, 34 Del. 460, 479-80, 154 A. 894 (1930). Such cases show that Delaware courts in following the general conflict of laws rule look to the place of contracting to determine the validity of a contract. They are relevant for our purpose to the extent only of showing that the courts of Delaware follow, as would be expected, the general rules of the conflict of laws."

How can adherence by Delaware to "the general rules of the conflict of laws" be logically deduced from the single instance that it holds the *lex loci contractus* controlling with respect to the validity of a contract?

of Contracts: Cases v. *Restatement*, 51 Yale L. J. 893. The author of this article points out that the Reporter for that Restatement does not even contend that the theories set forth in the Restatement are supported by a majority of the cases. Under these circumstances the conjecture of the Court below that the Delaware courts would apply particular sections of the Conflicts Restatement, even though they have never cited them, is particularly unconvincing.

(b)

In *Powell* v. *Maryland Trust Co.*, 125 F. (2d) 260 (C. C. A. 4), the question presented was whether stock dividends on stock pledged to secure a mortgage belonged to the pledgor or to the pledgee under a provision reserving to the former the right to "dividends".

The Circuit Court of Appeals, in an opinion by Judge Parker, held that the law of Maryland was the law properly applicable in determining the rights of the parties with respect to the stock dividend, inasmuch as the mortgage was made and delivered in Maryland and the shares of stock which were pledged were delivered there (125 F. (2d) 265).

There were no Maryland cases directly deciding the nature of a stock dividend and the right thereto as between pledgor and pledgee where "dividends" are reserved to the former. But there was abundant authority in Maryland upon a closely analogous question, namely, the nature of a stock dividend and the right thereto as between life tenant and remaindermen under trusts of corporate stock. The Maryland decisions held stock dividends to be income.

The Fourth Circuit nevertheless decided that its proper course was to exercise an independent judgment as to the law to be applied. It held (pp. 269-270):

> "The question before us is whether a stock dividend is a true dividend so as to be included in the reservation of dividends contained in the mortgage; and, as stated, the Maryland decisions are not determinative of this question. To apply the rule which they lay down with respect to the rights of life tenant and remainderman to the question before us, instead of the rule prescribed by reason for such a situation, is not required by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, or by any other decision. *To reason from analogy and apply the rule because of what we may guess the Maryland court would have decided if the case had been before it, is to indulge in vain speculation.* If the Maryland court, in any of the cases before it, had expressed an opinion on the question before us, which it did not do, it would have been a mere dictum, and one which we would have been under no obligation to follow. *Carroll* v. *Carroll*, 16 How. 275, 286, 14 L. Ed. 936; *New England Mut. Life Ins. Co.* v. *Mitchell*, 4 Cir., 118 F. 2d 414, certiorari denied 62 S. Ct. 60, 86 L. Ed.
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> In *Carroll* v. *Carroll*, *supra*, the Supreme Court, after stating that the construction put by the state court upon a statute is not a decision to be followed within the *stare decisis* rule unless this was necessary to the determination of the rights of the parties before the court, went on to give the reason for the rule that dicta are without binding authority (and a fortiori the same is true of mere reasoning by analogy) as follows (16 How. 287, 14 L. Ed. 936): 'And therefore this court

and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. * * *'

After quoting the above in our opinion in *New England Mutual Life Ins. Co.* v. *Mitchell, supra* (118 F. 2d 420), we said: 'Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established *stare decisis* rule and its limitations. *Cf. West* v. *American Tel. & Tel. Co.* (311 U. S. 223), 61 St. Ct. 179, 85 L. Ed. 139 (132 A. L. R. 956). *We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts.* The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise.'" (Italics ours.)

The court then proceeded to resolve the question before it on the authority of *Gibbons* v. *Mahon,* 136 U. S.

549, and other Federal and State decisions stemming from *Gibbons* v. *Mahon* and following the so-called Massachusetts Rule relating to the disposition of stock dividends as between principal and income.

Judge Soper filed a dissent in which he stressed the apposite character of the Maryland authority which the Fourth Circuit refused to apply. He wrote:

> "We must determine whether under the Maryland law the provision of the contract, that the Railroad Company until default is entitled to dividends on the pledged stock, covers the stock dividend in this case. We are told that the stock dividend does not fall within the terms of the contract because a stock dividend is not a true dividend. The leading authorities cited for the rule in the opinion of the Court in the pending case are the well known decisions of *Gibbons* v. *Mahon*, 136 U. S. 549, and *Eisner* v. *Macomber*, 252 U. S. 189. These decisions are based upon the logical theory that a stock dividend really takes nothing from the property of the corporation and adds nothing to the interest of the stockholders; that it is not a realization of profits by the stockholders but a transfer of surplus to capital so as to be no longer distributable; while an ordinary dividend is a distribution of profits which the corporation makes and the stockholders realize. Moreover, it is said that the stock dividend in the pending case cannot fairly be described as a dividend payable to the Railroad Company within the meaning of the contract, because otherwise the interest of the Railroad Company in the Richmond-Washington Company, that originally amounted to a one-sixth interest, would be reduced to a one-ninth interest, and the security of the bondholders would be impaired.

These authorities and others like them, present the reasoning upon which is founded the so-called Massachusetts rule governing the apportionment of dividends between life tenant and remainderman under a trust set up by a will or deed. This rule is that stock dividends, regardless of their source, are invariably treated as corpus, and cash dividends are classified as income. If it is applied by analogy to the facts of the pending case, we must hold that the stock dividend in question belongs to the trustee under the mortgage. But the Massachusetts rule, although favored in the federal courts and in other jurisdictions, is not recognized in the law of Maryland. By a long line of decisions of the Court of Appeals of Maryland, a different theory known as the Pennsylvania rule was firmly embedded in the law of the State when the mortgage under consideration was executed in 1900 and there remained until it was repealed by Chapter 580 of the Laws of Maryland of 1939."

This Court denied certiorari on April 27th of this year.

(c)

The decision below is also in conflict with *Maki* v. *George R. Cooke Co.*, 124 F. (2d) 663 (C. C. A. 6). This was an action commenced in a Federal District Court in Michigan by a Minnesota resident against a Michigan corporation for pneumo-coniosis and tuberculosis allegedly contracted as a result of violation in Minnesota by the Michigan corporation of a Minnesota statute requiring sufficient ventilation of places where workmen are employed. The District Court dismissed the complaint on the ground that it was barred by the Michigan three-year statute of limitations. Plaintiff appealed on the ground, *inter alia*, that the time within

which his action could be commenced in Michigan was governed by the six-year limitation statute of Minnesota, under which the action was not barred. The latter was a general statute of limitations covering all actions commenced "upon a liability created by statute, other than those arising upon a penalty or forfeiture". The statute conferring the right of action contained no delimitation of time for its enforcement.

The Sixth Circuit, in an opinion by Judge Martin, adverted to this Court's decision in *Klaxon Co.* v. *Stentor Electric Mfg. Co. Inc.*, 313 U. S. 487, but observed (p. 665):

> "But we have been pointed to no opinions of Michigan courts which erect signposts to appropriate decision of the instant case."

The Court referred to various settled principles recognized by the Michigan courts, *e. g.*, that where a state statute creating a new cause of action prescribes that the action must be brought within a specified time, no action is maintainable in any state after the prescribed period has elapsed. However, the Court said:

> "But the problem presented us is not soluble by these settled principles. Here we confront a more complex situation * * *. May this Minnesota statute of limitations be construed as carrying extra-territorial force into the forum of the sister State of Michigan where a cause of action is brought for redress for personal injuries in pursuance to Minnesota statutes creating a right unknown to the common law?"

The Sixth Circuit thus faced the same difficult problem that confronted the Third Circuit in the present

case, viz., an absence of decisive State authority. But instead of attempting to decide the question by tenuous conjectures as to how a Michigan court might decide it, the Sixth Circuit forthrightly resolved the question in the affirmative on the authority of three Federal cases, namely, *Davis* v. *Mills*, 194 U. S. 451; *Theroux* v. *Northern Pacific Ry. Co.*, 64 F. 84 (C. C. A. 8); and *Boyd* v. *Clark*, 8 F. 849 (E. D. Mich.). The Court cited no Michigan authorities except in reference to the "settled principles" which, as the Court said, did not solve the problem. It referred to a leading text on Conflict of Laws, viz., Minor, but only as stating a view opposed to the Court's own conclusion.

The Sixth Circuit's application of the Erie doctrine in this case is substantially in accord with that of the *Powell* case, *supra*, and is in the teeth of the approach of the Court below.*

II.

The Court below failed to apply properly the decision of this Court herein.

This Court indicated in its opinion herein that it did not regard interest as a matter on which Federal Courts are obliged to follow the *lex loci*—unless com-

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* In addition to the conflicts between Circuits shown above, the present insufficiently defined scope of the rule of *Erie* v. *Tompkins* has produced conflicting views among the individual members of Circuit Courts. In *Herbert* v. *Sullivan*, 123 F. (2d) 477, the First Circuit was divided upon this point. The main difference between the *Herbert* case and the *Powell* case is that the view of the majority in the *Herbert* case is in line with that of Judge Soper, whereas Judge Magruder's dissent in the *Herbert* case corresponds with Judge Parker's opinion in the *Powell* case. This Court denied certiorari in the *Herbert* case on February 9th of this year.

pelled so to do by the conflict of laws principles of the State wherein they are sitting. In its opinion, this Court referred to interest as a matter "with respect to which courts at the forum have commonly been free to apply their own or some other law as they see fit." This Court, accordingly, advanced a second ground for its reversal of the previous decision of the Circuit Court of Appeals, namely, that the Circuit Court's determination that interest from date of writ to date of verdict was substantive conflicted with the "traditional treatment of interest in diversity cases brought in the federal courts."

The view has been expressed that this secondary ground is inconsistent with the primary ground of the decision. See Comment, 41 Col. L. Rev. 1403, *Application by Federal Courts of State Rules on Conflict of Laws*. The commentator inquired at page 1404:

> "If the basis of the decision is the necessity of following the state rule, how is the federal rule relevant?"

The answer to this inquiry, petitioner submits, is that the Federal rule was to be applied in the event that the Court below should find no "state rule" on the question. According to the Court below, this is precisely the situation that developed on the remand. Yet the Court below apparently ignored the guidance which this Court provided, notwithstanding that the Court below has elsewhere recognized the propriety of applying a Federal ground of decision where the state law provides no decisive authority. *Gallup* v. *Caldwell*, 120 F. (2d) 90; *cf. Boyle* v. *Ward*, 125 F. (2d) 672, 675, footnote 8 (C. C. A. 3).

The applicable Federal authorities are set forth in petitioner's brief in this Court, October Term, 1940,

No. 741, pages 7-10, and petitioner's previous petition for certiorari herein, pages 14-16. Under these authorities the award of interest made by the District Court is not sustainable. See especially, *Jones* v. *Foster*, 70 F. (2d) 200 (C. C. A. 4).

III.

The decision below, in not following the considered dicta of inferior state courts, probably conflicts with this Court's decisions in *Erie* v. *Tompkins, supra*, and *West* v. *American Tel. & Tel. Co., supra*.

(a)

Petitioner in the Court below urged that under the Delaware internal law regarding interest, if applicable, the District Court's addition of interest to the verdict of the jury was invalid. Petitioner relied mainly on *Jacobs* v. *Murray*, 113 Atl. 803, 1 W. W. Harr. 209 (Del. Super., 1921), where it was said:

> "Further our courts have held that where a debt is wrongly withheld by the defendant, after the plaintiff has endeavored to obtain payment of it, *the jury may give interest* in the shape of damages for the unjust detention of the debt. Interest is allowed in general on the ground of contract, or the usage of trade where a promise to pay interest is implied from such usage or from other circumstances. *Stockton's Adm'r* v. *Guthrie*, 5 Har. 204; *Black's Ex'rs* v. *Reybold*, 3 Har. 528."

Other explicit statements of Delaware courts to the effect that interest is in the jury's discretion are found in *Bailey* v. *Capelle*, 1 Har. 429; *Morrow* v. *Frankish*, 89 Atl. 740, 4 Boyce 534; and *Black's Ex'rs* v. *Reybold*, 3 Har. 528, 530, all of which were cited to the Court below.

The consequence, of course, of the fact that the

allowance of interest is in the jury's discretion, is that the court cannot amend the verdict so as to allow interest. *Jones* v. *Foster*, 70 F. (2d) 200 (C. C. A. 4); *Wright* v. *Harlan Fuel Co.*, 283 S. W. 944, 214 Ky. 602; *St. Louis etc. Ry. Co.* v. *Seale*, 267 S. W. 676 (Tex. Comm. App.); *Manglesdorf Seed Co.* v. *Pauls Valley Grain & Seed Co.*, 8 Pac. (2d) 1100, 155 Okla. 270.

The Court below did not controvert the latter proposition, but distinguished the above quotation from the *Jacobs* case, *supra*, as being dictum and further held:

> "But in numerous other cases judges have instructed juries upon the allowance of interest without leaving the matter of its recovery to any discretion on the part of the jurors. See, *e. g.*, *State of Del.* v. *Mass. Bonding & Ins. Co.*, 40 Del. 274, 9 A. (2d) 77 (1939) (balance due on sale of goods); *Drew & Co.* v. *Southern Grocery Stores, Inc.*, 37 Del. 355, 183 A. 511 (1935); *Culver* v. *Prudential Ins. Co.*, 36 Del. 582, 179 A. 400 (1935) (insurance); *Brooks Transportation Co.* v. *Merchants Mutual Casualty Co.*, 36 Del. 40, 171 A. 207 (1933) (indemnity). It is evident that the rule of law with regard to the recovery of interest as damages in Delaware has proceeded as it has elsewhere, namely, from the status of discretionary award by a jury to a matter of right. It may be added that it is now settled in Delaware that the court may correct a jury's verdict by additur with regard to an item, the amount of which is definite, which the jury should by law have included but did not. This was expressly said to include interest and earlier cases to the contrary were overruled. *Rudnick* v. *Jacobs*, 39 Del. 169, 197 A. 381 (1938).
>
> Our conclusion, then, with regard to the interest cases on controversies involving only the in-

> ternal law of Delaware is that they are not conclusive here. But to the extent which they bear on the question at all they show a recognition in the Delaware law with regard to damages that moratory interest is a matter of right and plaintiff is entitled to it on that basis."

The Delaware cases regarding interest cited by the Court in the above quotation, as well as "the earlier cases" overruled in the *Rudnick* case (which itself did not involve interest), were all plain cases of liquidated damages and therefore had no bearing on the present case where damages were entirely unliquidated. * For over one hundred years Delaware has applied the familiar distinction in contract cases that the award of interest is mandatory where damages are liquidated but rests in the discretion of the trier of the facts when damages are unliquidated. The Circuit Court's statement that the Delaware law has changed is mere speculation unsupported by the utterance of any Delaware court.

It is submitted that under the spirit, if not the letter, of this Court's decision in *West* v. *American Tel. & Tel. Co., supra*, the Court below was bound to follow the considered pronouncement in *Jacobs* v.

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* In the *Rudnick* case, the additur was made *with the defendant's consent*. The power of a Delaware Court, upheld in the *Rudnick* case, to add to the verdict of a jury an item of damage, when consented to by the party to be charged, is of course no authority for a Federal Court in Delaware to add to a verdict of a jury an item of interest over objection.

Since the law of New York would be a question of disputed fact for the jury in a Delaware Court, there is an additional ground against the position of the Court below that such disputed issue must be decided *by the Court* in favor of rather than against the allowance of interest. No support is found in any Federal or State Court for such procedure. Moreover, in *Mutual Benefit Health & Accident Ass'n* v. *Thomas*, 123 F. (2d) 353, the Eighth Circuit held that the Federal Courts have no power to increase the jury's verdict but may only grant a new trial, notwithstanding that additions to the verdict may be allowed by the State Courts.

Murray, supra, even though made by a trial court and technically a dictum.

(b)

Petitioner contended in the Court below that even assuming that Section 480 of the New York Civil Practice Act is applicable in this case as a matter of conflict of laws, the award of interest must nevertheless be set aside. Petitioner relied on *First International Pictures, Inc.* v. *F. C. Pictures Corp.*, 262 App. Div. 21, 28 N. Y. Supp. (2d) 715 (4th Dept., decided May 14, 1941). In this case Crosby, *P. J.*, for a unanimous court, said:

> "* * * In the absence of any showing to the contrary it must be assumed that the court gave, and that the jury obeyed, instructions to include all proper elements of damage in their verdict. (See *Urband* v. *Lubell*, 245 N. Y. 156; *Fleming* v. *Jacob*, 57 Misc. 372, and cases therein cited.)
>
> A correct statement of the law, as I view it, is the following: 'The court may and should amend the verdict by computing and adding interest where it is clear that interest should be included, * * * but the court cannot add interest * * * if there is a possibility that the jury have already allowed interest in the amount of recovery fixed in the verdict.' (64 C. J., p. 1100, Sec. 900, and cases cited in footnote. See also, 4 id., p. 766, Sec. 2710; *Hunter* v. *Surety Co.*, 159 Iowa 114, 140 N. W. 194; *Edwards* v. *McCaddon*, 20 Iowa 520.)"

The present case falls within the rule stated above, notwithstanding that the District Judge's charge did not explicitly refer to interest. It is well recognized that juries, when not specifically instructed on the subject of interest, do on occasion include interest in their verdicts. See *Farish* v. *Madison Distribut-*

ing Co., 37 F. (2d) 455; *Biederman* v. *Interstate Trust & Banking Co.*, 154 S. W. 843, 172 Mo. App. 1; *Wilson & Co.* v. *Atlanta R. R. Co.*, 16 S. C. 587, and other cases cited 64 Corpus Juris 1083.

Since the verdict in this case was for only a fraction of the *ad damnum*, it cannot be said with certainty whether the verdict included interest. However, there is not only a possibility, but a probability, that it did include interest. For the jury was aware that the plaintiff's claims dated back between eight and eighteen years and that during such period the plaintiff had been deprived of the damages which in the jury's view were lawfully owing to the plaintiff. The natural expectation, therefore, is that the jury considered interest in arriving at the amount of the damages. Moreover, the District Court charged as follows:

> "* * * If you find from the evidence and under the principles of law given to you by the Court that the defendant broke its contract, your verdict should be for the plaintiff in such amount *as will compensate it for the damages flowing from such breach.* If you do not so find your verdict should be for the defendant."

Under the circumstances this charge invited the jury, if any prompting was necessary, to include interest. Not only as a practical matter but as a matter of law the italicized phrase comprehended moratory interest. See *Miller* v. *Robertson*, 266 U. S. 243, 257-8; *Fidelity & Casualty Co.* v. *Huse & Carleton, Inc.*, 172 N. E. 590, 272 Mass. 448.

Judge Goodrich distinguished the present case from the *First International* case on their respective facts. He emphasized that in the *First International* case it did not appear with certainty whether or not the jury was instructed to add interest, whereas in the present

case the record shows the jury was not expressly instructed to add interest. But is it sufficient to distinguish the two cases on their precise facts? Was it not the duty of the Court below, under the rule of the *West* case, to apply the principle which the New York Appellate Division quoted from Corpus Juris and characterized as "a correct statement of the law"?

In footnote 13 of its opinion (125 F. (2d) 826), the Court below made the puzzling statement that the *First International* case "stands for no more than an interpretation by a New York court of a particular charge to the jury". It is not clear how the rule quoted with approval from Corpus Juris can be construed as an interpretation of a particular charge to a jury.

IV.

The decision below creates a questionable exception to the rule of *Klaxon Co.* v. *Stentor Electric Mfg. Co., supra.*

The Court below raised this rather complex objection to applying the rule of the *First International* case:

> "In our judgment counsel shoots wide of the mark when he states that the New York decision is controlling 'as a matter of constitutional right under the doctrine of the Tompkins case'. The Supreme Court doctrine, as we conceive it to be, is that lower federal courts shall handle questions of state law as a state court would handle them. In this case what we are concerned with is that part of the Delaware state law having to do with the trial of a case involving a New York contract. The New York law is a question of fact to the Delaware court, in whose province it lies to evaluate the New York law, including cases such as the First International Pictures case."

The Court's position presents the following question: When a Federal Court, sitting in State X, has applied a statute of State Y pursuant to the rule of *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* may the Federal Court refuse to apply a decision of State Y construing the statute? Petitioner concedes that if the courts of State X have refused to apply the decision of State Y construing the statute, the Federal Court sitting in State X need not, and indeed should not, apply the construing decision. But until the courts of State X have indicated they will not apply the construing decision, there is every reason to assume that they will apply it when the occasion arises. In petitioner's opinion it trenches upon the doctrine of the *Klaxon* case for a Federal Court, sitting in State X and applying the statute of State Y, to reject the construction put upon the statute by the courts of State Y. In *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, the decision of a Vice-Chancellor construing a statute was deemed more persuasive than the statute itself. See Corbin, Arthur L., *The Laws of the Several States,* 50 Yale L. J. 762, 768. In any event, it is submitted that the decision of the Court below on this question should be examined by this Court because it *appears,* at least, to create a major exception to the Klaxon doctrine.

Conclusion.

WHEREFORE, your petitioner respectfully prays that this petition be granted.

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